Supreme Court, U.S.
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No. 85-64

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

WORLD OF SLEEP, INC.,
Cross Petitioner,

v.

LA-Z-BOY CHAIR COMPANY;
MONTGOMERY WARD & CO., INC.;
ARTHUR MAULDIN, individually and
d/b/a LA-Z-BOY SHOWCASE SHOPPE,
Cross Respondents.

On Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF CROSS RESPONDENT MONTGOMERY WARD & CO., INCORPORATED

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QUESTION PRESENTED

Did the Court of Appeals correctly determine that there was insufficient independent evidence of a conspiracy involving Montgomery Ward & Co., Incorporated and consequently hold that certain tape recorded telephone conversations were not admissible in evidence against Montgomery Ward under Rule 801(d)(2)(E) of the Federal Rules of Evidence, when Montgomery Ward was not a party to those conversations?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	7
I. THIS CASE DOES NOT REPRESENT A CONFLICT AMONG THE CIRCUITS THAT JUSTIFIES THIS COURT'S REVIEW	7
II. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT	9
III. THIS CASE DOES NOT INVOLVE A FEDERAL QUESTION THAT HAS BEEN DECIDED IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT	12
A. The Court of Appeals Did Not Misread the Teaching of *Monsanto*	13
B. The Court of Appeals Did Not Fragment a Single Conspiracy into Separate Conspiracies in Violation of *Union Carbide*	13
CONCLUSION	15
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962)	12, 13, 14
Glasser v. United States, 315 U.S. 60 (1942)	8
Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984)	12, 13
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)	8
United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978)	9
United States v. Andrews, 585 F.2d 961 (10th Cir. 1978)	9
United States v. James, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979)	9
United States v. Petersen, 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980)	9
United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977)	9
World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 (1985)	*passim*

STATUTES:	
Sherman Act, 15 U.S.C. § 1	2
Robinson-Patman Act, 15 U.S.C. § 13	2

OTHER AUTHORITIES:	
Fed. R. Evid. 104(a)	7, 8
Fed. R. Evid. 801(d)(2)(E)	7
Sup. Ct. R. 17	7

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BRIEF IN OPPOSITION OF CROSS RESPONDENT MONTGOMERY WARD & CO., INCORPORATED

OPINION BELOW

The opinion of the Court of Appeals is reported at 756 F.2d 1467 and is printed in the Appendix to the Cross Petition.

STATEMENT OF THE CASE

World of Sleep, Inc. ("World of Sleep") claims that La-Z-Boy Chair Company ("La-Z-Boy"), Montgomery Ward & Co., Incorporated ("Montgomery Ward") and

Arthur Mauldin, individually and doing business as La-Z-Boy Showcase Shoppe ("Mauldin"), conspired to deny World of Sleep access to La-Z-Boy reclining chairs for resale in Denver, Colorado, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.[1] The District Court granted summary judgment for Mauldin and entered judgment on a jury verdict for La-Z-Boy and Montgomery Ward. The Court of Appeals affirmed the summary judgment in favor of Mauldin, affirmed the judgment in favor of Montgomery Ward on the ground that it had been entitled to a directed verdict and reversed the judgment with respect to La-Z-Boy because it found error in the jury instructions. The Court's opinion as to La-Z-Boy is not at issue in this cross petition.[2]

The Competitive Position of the Parties in the Denver Market

Montgomery Ward is a nation-wide retailer of consumer products, headquartered in Chicago. It has a number of retail stores in the Denver area and, during the years at issue in this case, its yearly sales volume in metropolitan Denver exceeded $20,000,000. World of Sleep was essentially a single product-line operation with a few stores in the Denver area, concentrating on mattresses and related items as a discount "sleep shop."

In 1974, World of Sleep added La-Z-Boy reclining chairs to its product line. La-Z-Boy already had a number of dealers in the Denver area, including Montgomery Ward, which had sold La-Z-Boy chairs for years. While Montgomery Ward was La-Z-Boy's single largest customer by virtue of its nation-wide sales volume, La-Z-Boy

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[1] Montgomery Ward is a wholly-owned subsidiary of Marcor, Inc., which is in turn a wholly-owned subsidiary of Mobil Corporation. All of Montgomery Ward's subsidiaries are wholly-owned.

[2] The Court below also entered judgment on a jury verdict for World of Sleep on its claim against La-Z-Boy under the Robinson-Patman Act. 15 U.S.C. § 13(e). Montgomery Ward is not involved in that claim and this brief will not address it.

reclining chairs did not represent a particularly significant component of its merchandising program. La-Z-Boys were not even the best selling brand of reclining chairs for Montgomery Ward because La-Z-Boy chairs tended to be priced toward the upper end of the reclining chair spectrum. Rec. XII, at 2030. Consistent with its merchandising philosophy of appealing principally to the broad middle range of consumers, Montgomery Ward had far more retailing success with reclining chair lines in the middle of the price-range, such as Shannon. Rec. XII, at 2030. Montgomery Ward's furniture department accounted for six to seven percent of its total retail sales in Denver, but sales of La-Z-Boy chairs represented only half of one percent of its Denver sales. Rec. XII, at 2028-30.

In 1974 and 1975, World of Sleep experienced substantial success in selling La-Z-Boy chairs. However, so did Montgomery Ward. While the evidence at trial indicated that World of Sleep gained an increasingly large share of the total sales of La-Z-Boy reclining chairs in the Denver area as a result of its aggressive discount advertising, there was no discernable impact upon Montgomery Ward because its own La-Z-Boy reclining chair sales were increasing at the same time. Gene Spilo, Montgomery Ward's district merchandiser in Denver, testified:

> Q [Mr. Gentry] . . . We were talking about the impact that World of Sleep had on Montgomery Ward's La-Z-Boy sales, and do you know whether or not there was any impact on Montgomery Ward's La-Z-Boy sales?
>
> A [Mr. Spilo] I don't think so.
>
> Q What do you base that on?
>
> A Because our sales were increasing.
>
> Q And did they increase between 1973 and 1977?
>
> A As far as I can recall.

Rec. VII, at 968.

Montgomery Ward's Complaint About World of Sleep's Comparison Advertising

In the summer of 1975, World of Sleep ran a television advertisement featuring a Montgomery Ward catalog page in the hands of a World of Sleep employee, who said that the customer could buy the same chair from World of Sleep at a lower price. Rec. III, at 306-08. Montgomery Ward objected to the use of its name in an advertisement of this type on the ground that it was unethical, and complained about the matter to La-Z-Boy. Rec. VII, at 1046-47. La-Z-Boy in turn asked World of Sleep to stop using Montgomery Ward's name in its advertising, and World of Sleep agreed to do so. Rec. III, at 306-08.

Montgomery Ward believed that name comparison ads were unethical because of the misleading impression concerning values offered to the customer based upon a comparison of only one specific item with another. Rec. VI, at 912-15, 917-18. As Montgomery Ward's Denver buyer testified at trial, name comparison ads create the false impression that the entire merchandise line of a particular competitor is offered at the same cost saving. Rec. XII, at 2057.

There is no evidence that Montgomery Ward's complaint in the summer of 1975 was motivated by anything other than its belief that the name comparison advertising by World of Sleep was unethical. It never complained about the prices charged by World of Sleep for La-Z-Boy chairs. Rec. V, at 685-87. It never objected to any of World of Sleep's price promotions, nor to its method of advertising except for the one instance in which Montgomery Ward's name was specifically used. Rec. V, at 684-89. There was no impact of any kind on World of Sleep's sales of La-Z-Boys. World of Sleep continued to buy from La-Z-Boy as many chairs as it

wanted, and its volume of sales of La-Z-Boy chairs continued to increase. Rec. V, at 687.

In March 1976, Mauldin opened a Showcase Shoppe in Denver, devoted exclusively to the sale of La-Z-Boy chairs. Rec. XII, at 2067. World of Sleep had learned some months prior to this time that a new competitor was contemplated for Denver, and had asked La-Z-Boy that World of Sleep be allowed to own the Showcase Shoppe. However, World of Sleep was not selected by La-Z-Boy. Rec. V, at 631-32.

The entry of this new competitive force into the Denver market triggered a price war by World of Sleep against Showcase Shoppe. Rec. III, at 300. There was no objection by Montgomery Ward to this advertising, which featured substantial price reductions on La-Z-Boys. Nor did Montgomery Ward object to the entry of the Showcase Shoppe into the Denver market. Rec. V, at 692. Indeed, Montgomery Ward's only involvement in the Denver situation came when World of Sleep again resorted to comparative advertising using a Montgomery Ward catalog page, again raising the issue of the ethics of this type of advertising. Rec. VI, at 912-13.

A copy of the comparative ad, which appeared in a Denver newspaper, was sent from Montgomery Ward's district office in Denver to its home office in Chicago, with a note saying, "Look what's happening in Denver." Rec. VII, at 973. When the note was received by Al Weissenstein, the reclining chair buyer for Montgomery Ward, he telephoned Robert Rall of La-Z-Boy with a simple request that World of Sleep be asked not to run newspaper advertisements featuring Montgomery Ward's catalog. Rec. VI, at 915. This complaint was made in mid-June, 1976, three weeks after La-Z-Boy had put World of Sleep on a credit hold because it was past due on several invoices aggregating more than $45,000. Rec. III, at 309-10; Rec. XIII, at 2307; Exhibit 21.

The Hearsay Statements of Robert Rall

World of Sleep's characterization of Montgomery Ward's complaint as part of a price fixing conspiracy is supported entirely by two telephone conversations in June 1976 between Thomas Hansen, World of Sleep's president, and Robert Rall, La-Z-Boy's vice president of marketing, which Hansen secretly recorded. Rall is the individual that World of Sleep called a liar in its brief to the Court of Appeals below. Brief for World of Sleep at 28 (excerpt reprinted in the Appendix to this Brief, at 1a).

In the first of these taped conversations, Exhibit 2, Appendix to Cross Petition at 38a-54a, which occurred on June 16, 1976, Rall mentioned a complaint by Montgomery Ward, but did not ascribe any specific content to it. When Rall later testified under oath in this case, he stated that the complaint from Montgomery Ward was about the ethics of the name comparison advertising, on the ground that Montgomery Ward did not believe this type of advertising was clean. Rec. VII, at 1102.

In the second taped conversation with Hansen, Exhibit 3, Appendix to Cross Petition at 55a-59a, which occurred on June 23, 1976, Rall said that he had just come from a four and one half hour meeting in Chicago with Jim Lutz, a vice president at Montgomery Ward. Rall told Hansen on the telephone that Lutz had the World of Sleep ad pinned up on his wall and "he almost pinned me up on the wall, too." When Rall testified under oath, however, he admitted that no such meeting with Lutz had ever occurred. Rec. VII, at 1099, 1101-02. This was confirmed by Lutz himself, Rec. XII, at 2014, as well as by Weissenstein, Rec. VI, at 916-17. Lutz testified that no problem involving La-Z-Boy was ever brought to his attention during his ten years as vice president of Montgomery Ward, and that he had never even heard of World of Sleep until after litigation was instituted by

World of Sleep and Lutz had received a subpoena for his deposition. Rec. XII, at 2011-12.

The Limited Scope of Montgomery Ward's Involvement

World of Sleep never contended, and did not present any evidence at trial, that Montgomery Ward was in any way responsible for the credit hold on World of Sleep imposed by La-Z-Boy in May 1976. There was no evidence of any contact between Montgomery Ward and La-Z-Boy concerning World of Sleep after June 1976, nor was there any evidence of any contact at any time between Montgomery Ward and Mauldin on any subject.

REASONS FOR DENYING THE WRIT

Review by this Court on a writ of certiorari is not a matter of right but is granted in this Court's discretion only when there are "special and important reasons therefor." Sup. Ct. R. 17. The reasons listed in Rule 17 include a conflict between the decision of the Court below and the decision of another Court of Appeals on the same question, the presence of an important question of federal law that has not been but should be settled by this Court, and a decision below that is in conflict with the applicable decisions of this Court.

World of Sleep's cross petition raises no question that falls into any of these categories, or any question of a similar character.

I. THIS CASE DOES NOT REPRESENT A CONFLICT AMONG THE CIRCUITS THAT JUSTIFIES THIS COURT'S REVIEW.

World of Sleep is correct in asserting that the Courts of Appeals differ as to whether hearsay, such as the tape recorded telephone conversations in this case, should itself be considered in determining whether it is admissible against a co-conspirator under Rule 801(d)(2)(E) of the Federal Rules of Evidence. Rule 104 of the Federal Rules of Evidence requires the trial judge to make that

determination without being "bound by the rules of evidence except those with respect to privileges." Fed. R. Evid. 104(a). All twelve Circuits have considered this question; ten have held that the hearsay in question should not be considered and two have said that it is not an error for the trial judge to consider it. Cross Petition at 24-27.[3]

Not all disagreements among Courts of Appeals justify certiorari, however. Such a writ will be granted only when there is a "real and embarrassing conflict of opinion and authority" among them. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). The disagreement among the Courts of Appeals relied upon by World of Sleep falls far short of that standard.

Ten of the Circuits, including the Court of Appeals below, have concluded that, before a statement of one co-conspirator is to be admitted against another co-conspirator who was not present when the statement was made, the conspiracy and the participants should be shown by "independent" evidence, that is, evidence other than the hearsay statement sought to be admitted. In so doing, the Courts of Appeals in those Circuits followed the rule set down by this Court in *Glasser v. United States*, 315 U.S. 60 (1942), prior to the adoption of Rule 104:

> [S]uch declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. . . . Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence.

315 U.S. at 74-75 (citations omitted).

In applying this principle after the adoption of Rule 104, the Court of Appeals below followed the landmark

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[3] For the convenience of the Court, citations to the leading cases in the various Courts of Appeals are set forth in the Appendix to this Brief, at 1a-3a.

case of *United States v. James*, 590 F.2d 575, 580-81 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979), and its own earlier opinions, *United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980), and *United States v. Andrews*, 585 F.2d 961, 964 (10th Cir. 1978). In so doing, it did not fail to follow Rule 104. It did not refuse to consider inadmissible evidence in making its determination. It simply refused to consider the evidence in question itself. In the words of this Court, it did not let the tape recorded telephone conversations "lift [themselves] by [their] own bootstraps" into admissible evidence against Montgomery Ward.[4]

Even the Court of Appeals for the First Circuit, one of the two Circuits that has found that it was not error for trial judges to consider the proferred hearsay evidence, has admonished them to "give little weight to bootstrap evidence in deciding whether to admit hearsay under the co-conspirator exception." *United States v. Petrozziello*, 548 F.2d 20, 23 n.2 (1st Cir. 1977).

Thus, the Court of Appeals below applied the law as stated by the Courts of Appeals for the vast majority of the circuits in this country and consistent with the latest pronouncement of this Court on the subject. This does not present a "real and embarrassing conflict of opinion" that justifies the issuance of a writ of certiorari.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals affirmed the judgment for Montgomery Ward because the record contained "insufficient

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[4] *See United States v. Alvarez*, 584 F.2d 694, 697 (5th Cir. 1978) ("the preliminary determination commanded by *Glasser* rejects evidence not based upon its admissibility but according to whether such evidence is *independent* of the proffered hearsay").

independent evidence of Montgomery Ward's participation in the alleged conspiracy to permit the admission of co-conspirator's hearsay statements" and the "independent evidence, standing alone, was not enough to allow this issue to go to the jury." 756 F.2d 1475; Appendix to Cross Petition at 15a. This does not raise an important question of federal law. World of Sleep is simply asking this Court to review the evidence and reach the opposite conclusion.

Significantly, in its review of the evidence, World of Sleep refers extensively to statements from the tape recordings themselves, Cross Petition at 14-23—exactly the bootstrapping approach that the Court of Appeals correctly rejected. A few examples will suffice to make the point.

1. World of Sleep emphasizes that "[i]n this case an actual, not inferred, agreement to fix prices existed: 'I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up'." Cross Petition at 15, 24. World of Sleep does not disclose, however, that this statement occurred in one of the taped conversations that the Court of Appeals found to be inadmissible as to Montgomery Ward. Appendix to Cross Petition at 39a.

2. "I got pinned to the wall; I took a beating over there; I feel a little bludgeoned right now" are, according to World of Sleep, statements that are "not hearsay as to Rall's reaction" to a meeting allegedly held at Montgomery Ward.[5] Cross Petition at 17. But these statements all come from a recorded conversation, Appendix to Cross Petition at 55a-56a, and constitute part of the hearsay evidence in question—not independent evidence of anything.

3. World of Sleep claims that the statement "[o]ur plan is to leave you right there [on credit

[5] The controversy over whether such a meeting ever really occurred is summarized in the Statement of the Case, at 6-7 above.

> hold] until we can figure out exactly what's gonna happen" is evidence that La-Z-Boy terminated World of Sleep as a result of Montgomery Ward's complaint about the ads. Cross Petition at 23. Again, World of Sleep fails to disclose that this statement comes from the tape recorded conversations, Appendix to Cross Petition at 56a, and is part of World of Sleep's effort to use the hearsay recordings to bootstrap themselves into admissible evidence.

When the tape-recorded conversations are excluded, the evidence shows no more than that Montgomery Ward complained on two occasions about advertising in which World of Sleep used Montgomery Ward's name, and even then Montgomery Ward only asked that the advertising be stopped. There is not a scintilla of evidence in the record, let alone substantial independent evidence, that Montgomery Ward ever asked or even suggested that La-Z-Boy stop selling to World of Sleep.

On the occasion of Montgomery Ward's first complaint—a year before the events on which World of Sleep relies—the ads stopped. On the second occasion, La-Z-Boy, unknown to Montgomery Ward, had already placed World of Sleep on a credit hold that restricted World of Sleep's access to additional La-Z-Boy chairs. There is no evidence that Montgomery Ward had anything to do with the credit hold. There is no evidence that Montgomery Ward complained about the Showcase Shoppe's entry into the Denver market or about the price war between the Showcase Shoppe and World of Sleep or about World of Sleep's pricing policies. Nor, contrary to World of Sleep's assertions, was Montgomery Ward disturbed by World of Sleep's competition. Montgomery Ward did not see its sales of reclining chairs fall in response to that competition. It did not regard La-Z-Boy's chairs as its principal line of reclining chairs because they were aimed at the high end of the market. In fact, reclining chairs were not an important part of

its business in Denver because they accounted for less than one half of one percent of its sales in that market.

Thus, the Court of Appeals correctly characterized the independent evidence as follows:

> The only independent evidence of a conspiracy between them [Montgomery Ward and La-Z-Boy] is precisely that which was held to be insufficient to raise a conspiracy fact issue in *Monsanto* [*Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984)]—complaints by a dealer who competes with the price cutting plaintiff, and action in response by the manufacturer adverse to the price cutter.

756 F.2d 1475; Appendix to Cross Petition at 15a. The Court of Appeals then concluded, following this Court's teachings in *Monsanto*, that the evidence "does not tend to exclude the possibility that La-Z-Boy and Montgomery Ward were acting independently" so it did not show that a conspiracy existed and the taped telephone conversations were not admissible against Montgomery Ward. This conclusion, based upon the Court of Appeals' review of the facts in the record, does not present an important question of federal law that should be settled by this Court.

III. THIS CASE DOES NOT INVOLVE A FEDERAL QUESTION THAT HAS BEEN DECIDED IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In an effort to convert the Court of Appeals' review of evidence into a legal determination worthy of this Court's review, World of Sleep suggests that the Court of Appeals' decision is in conflict with two Supreme Court cases, *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). These contentions will be discussed separately.

A. The Court of Appeals Did Not Misread the Teaching of *Monsanto*.

World of Sleep asserts that the Court "superimpose[d] the entire *Monsanto* standard on the 'substantial independent evidence' requirement of the co-conspirator rule" and apparently complains that this excludes the use of any hearsay evidence to prove a case under the *Monsanto* standard. Cross Petition at 14.

This mischaracterizes the Court of Appeals' reasoning. In its opinion, the Court of Appeals simply looked to *Monsanto* to determine the elements of the conspiracy to be proved and then looked to the independent evidence to see whether those elements were shown. Nowhere did the Court indicate that, if substantial independent evidence existed to show the elements of a conspiracy required by *Monsanto*, hearsay statements would not then be admissible to form additional evidence to be considered by, and perhaps persuade, the jury. 756 F.2d 1474-75; Appendix to Cross Petition at 13a-16a. The Court of Appeals merely held that the tapes were inadmissible because the only independent evidence of a conspiracy between Montgomery Ward and La-Z-Boy was Montgomery Ward's complaints about La-Z-Boy's ads—"precisely that which was held to be insufficient to raise a conspiracy fact issue in *Monsanto*." 756 F.2d at 1475; Appendix to Cross Petition at 15a. This is a correct reading of this Court's teaching in *Monsanto*, not a decision in conflict with it.

B. The Court of Appeals Did Not Fragment a Single Conspiracy into Separate Conspiracies in Violation of *Union Carbide*.

In another effort to convert the Court of Appeals' analysis of the evidence into legal error, World of Sleep asserts that the Court of Appeals' approach was "to fragment or compartmentalize the evidence of conspiracy" in violation of this Court's opinion in *Continental*

Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), in which the Court stated that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 699.

The Court of Appeals did nothing of the sort. It viewed the evidence as a whole, including the taped telephone conversations, and concluded that the totality of this evidence entitled World of Sleep to go to the jury. Because the taped conversations were admissible against La-Z-Boy, the Court of Appeals held that the case was properly submitted to the jury as to that defendant. 756 F.2d at 1475-76; Appendix to Cross Petition at 16a-17a. However, because the taped conversations were inadmissible against Montgomery Ward, the Court of Appeals reviewed separately the remaining evidence and held that an insufficient showing of conspiracy had been made by World of Sleep. On this basis, it affirmed the judgment in favor of Montgomery Ward. 756 F.2d at 1473-75; Appendix to Cross Petition at 11a-16a.[6]

The Court of Appeals' decision represents nothing more than the common situation in litigation in which a plaintiff is able to produce sufficient evidence to go to a jury against one defendant but insufficient evidence to go to a jury against others. There is nothing in this conclusion that is in conflict with *Union Carbide* or any other decision of this Court.

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[6] The Court affirmed the judgment in favor of Mauldin for the same reason.

CONCLUSION

The Court of Appeals affirmed the judgment in favor of Montgomery Ward after it applied well-settled principles of evidence to the facts in the record. Its ruling in this regard presents no issue that justifies this Court's review. The writ should be denied.

Respectfully submitted,

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APPENDIX

EXTRACT FROM WORLD OF SLEEP'S BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT, PAGE 28

The evidentiary references in the Statement of Facts make it indisputable that the actions of La-Z-Boy and Montgomery Ward were price orientated. World of Sleep declared a "Price War on La-Z-Boys" and it compared Montgomery Ward's high prices to its own lower prices in the newspapers; it drastically cut Showroom Shoppe's prices. La-Z-Boy was concerned that its La-Z-Boy dealer could not maintain high enough prices to make a profit "for a good manufacturer-dealer relationship to exist" if it engaged in a contest with World of Sleep. Montgomery Ward couldn't compete with World of Sleep's low prices; they didn't have to. Instead they "asked" a $12,000,000 question, "can't you get the guy to stop?" According to Rall, he wasn't just asked, he was called in for a "command performance" where he got "kicked in the ass" and "really took a beating over there." It is no wonder he lied to Montgomery Ward when he reported back, sir, "he said he wouldn't do it."

LEADING CASES BY CIRCUIT CONSTRUING FEDERAL RULE OF EVIDENCE 104(a)

Circuits holding that a trial judge may not consider the hearsay statements themselves in determining admissibility:

Second Circuit: *see United States v. Terry*, 702 F.2d 299, 320 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir. 1981), *cert. denied*, 454 U.S. 839 (1981); *United States v. Ziegler*, 583 F.2d 77, 79 (2d Cir. 1978).

Third Circuit: *see United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir. 1984), *cert. denied*, 105 S. Ct.

779 (1985); *United States v. Trotter*, 529 F.2d 806, 811 (3d Cir. 1976).

Fourth Circuit: *see United States v. Talbert*, 706 F.2d 464, 468 (4th Cir. 1983); *United States v. McCormick*, 565 F.2d 286, 289 (4th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978); *United States v. Stroupe*, 538 F.2d 1063, 1065 (4th Cir. 1976).

Fifth Circuit: *see United States v. Marbury*, 732 F.2d 340, 401 (5th Cir. 1984); *United States v. James*, 590 F.2d 575, 580-81 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); *United States v. Alvarez*, 584 F.2d 694, 697 (5th Cir. 1978).

Seventh Circuit: *see United States v. Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

Eighth Circuit: *see United States v. Fahnbulleh*, 748 F.2d 473, 476 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2685 (1985); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978).

Ninth Circuit: *see United States v. Miranda-Uriarte*, 649 F.2d 1349 (9th Cir. 1981); *United States v. Batimana*, 623 F.2d 1366, 1368 (9th Cir.), *cert. denied*, 449 U.S. 1038 (1980).

Tenth Circuit: *see United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); *United States v. Andrews*, 585 F.2d 961 (10th Cir. 1978).

Eleventh Circuit: *see United States v. Monaco*, 702 F.2d 860, 876 (11th Cir. 1983).

D.C. Circuit: *see United States v. Jackson*, 627 F.2d 1198, 1214-15 (D.C. Cir. 1980).

Circuits holding that a trial judge may consider the hearsay statements themselves in determining the question of admissibility:

First Circuit: *see United States v. Drougas*, 748 F.2d 8, 29 (1st Cir. 1984); *United States v. Martorano*, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978);

Sixth Circuit: *see United States v. McCullah*, 745 F.2d 350, 358 (6th Cir. 1984); *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).